DOCKET NO. HHB CV 17 6038099

TESLA, INC. : SUPERIOR COURT

v. : JUDICIAL DISTRICT OF NEW BRITAIN

CONNECTICUT DEPT. OF
MOTOR VEHICLES ET AL. : DECEMBER 6, 2018

MEMORANDUM OF DECISION

General Statutes § 14-52 (a) provides that "(n)o person, firm or corporation may engage in the business of . . . selling . . . [or] offering for sale . . . any motor vehicle . . . without having been issued . . . a new car dealer's . . . license." The plaintiff Tesla, Inc. (Tesla), a designer and manufacturer of electric motor vehicles, is engaged in the business of selling and offering motor vehicles for sale. The question posed by this case, however, is whether it is doing so at the "Gallery" it established and operates in Greenwich, Connecticut, without the new car dealer's license required by § 14-52 (a).

In July 2016 the defendant, Connecticut Automotive Dealers Assn., Inc. (association), a trade association representing franchised motor vehicle dealers in Connecticut, filed a petition, pursuant to General Statutes § 4-176, for a declaratory ruling by the department of motor vehicles (department) as to the applicability of § 14-52 (a) to Tesla's activities at the Gallery it

planned to establish in Greenwich. Tesla was given notice of the petition and permitted to intervene in the proceeding and provide evidence at a hearing conducted in January 2017 by a department hearing officer.

On April 25, 2017 the hearing officer issued a declaratory ruling that Tesla is "in violation of Section 14-52 of the Connecticut General Statutes by conducting activities collectively amounting to new car sales at its 'Gallery' at 340 Greenwich Avenue, Greenwich, CT for which, pursuant to that statute, a new car dealer license is required." He ordered Tesla to "immediately cease all business function at its 'Gallery'. . . until or unless the appropriate dealer license is issued . . . ." Record, p. 813.[1]

In response to a petition for a stay and for reconsideration filed by Tesla the hearing officer issued an amended declaratory ruling on May 2, 2017. Id., pp. 845 et seq. In that ruling he reworded his conclusion of law to read as follows: "Tesla's activities at the Gallery location constitute activities for which a license is required under Section 14-52 of the Connecticut General Statutes" and rescinded his order that Tesla cease its activities at the Gallery, staying any enforcement action until

[1] "Record" refers to the amended administrative record, docket entry # 107.

the time for an appeal of his ruling had expired. Id, pp. 844, 848. Pursuant to General Statutes § 4-183 (a),[2] Tesla has appealed to this court.[3]

The resolution of this dispute requires the court to evaluate the undisputed facts in light of the different theories of the parties as to what constitutes "engage[ing] in the business of . . . selling [and] . . . offering for sale" motor vehicles. Tesla argues that the evidence shows that no sales of motor vehicles take place at the Gallery nor are any binding offers for sale made there. In the absence of sales or offers for sale at that location Tesla cannot be held to be in the business of selling motor vehicles there. The defendants[4] maintain that the "business of . . . . selling" constitutes a series of activities, i.e., a *process* that can lead to a sale, and that the activities engaged in by Tesla's employees at the Gallery are just the sort of activities

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[2] "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section."

[3] There are three defendants, the department, Michael Bzdyra, the commissioner of the department (commissioner) and the association.

[4] Since the arguments put forward by all three defendants are identical in substance, in referring to those arguments the court will refer to them collectively as "the defendants."

that constitute the "business of . . . selling" whether or not any sales are consummated there. As such, those activities violate § 14-52 (a) when engaged in without a new car dealer's license.

The court agrees with the defendants and affirms the conclusion of the department's hearing officer that "Tesla's activities at the Gallery location constitute activities for which a license is required under Section 14-52 of the Connecticut General Statutes."

I

"Review of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable . . . . An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred." *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 561 (2009).

The hearing officer's amended ruling is a farrago of fact and law. Of the twenty-eight "findings of fact," only seven (¶¶ 12,

13, 14, 15, 22, 25 and 26) constitute "findings of basic fact" as to Tesla's conduct at the Greenwich Gallery.[5]

Those findings are as follows. The Gallery's staff consisted of a store manager as well as "product specialists" and "owner advisors." The latter received commissions and bonuses "tied to the number of 'Gallery' visitors who later purchased a vehicle, a practice which stopped at the end of 2016 after [the association] petition was filed." These payments of bonuses and commissions were "consistent with those employees who operated out of licensed locations."[6] Record, p. 846. Tesla vehicles were available for inspection at the Gallery, and "test drives were available for interested drivers." Id, p. 847.

Gallery employees were advised to answer questions regarding vehicle features and technology, to advise regarding the availability of financing and leasing from the company's website or a licensed facility, to "assist in configuring the look and features of the Tesla automobile and explain the 'possibility of purchase'

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[5] Other paragraphs recite the procedural history within the department, quote from statutes the hearing officer thought relevant, state inferences the hearing officer drew and legal conclusions he arrived at based on the evidence in the record.

[6] Tesla is licensed to operate sales facilities in some states, such as New York.

by visiting the company website." "Employees were advised that vehicle orders were not able to be taken at the Greenwich location." Id.

Employees at the Gallery may "explain the possibility of purchase" at the company website "or by suggesting they call a Tesla employee in California." Id. "The contract of sale and purchase is provided by Tesla to a prospective buyer in Connecticut and is consummated in Connecticut upon the execution and acceptance of the agreement by the buyer." Id.

Finally, the hearing officer found that the "purchase and sale agreement" indicated that Tesla will notify the buyer when the purchased vehicle will be ready for pickup either at a Tesla service center[7] or another location agreed to between Tesla and the buyer. That agreement further provided that the buyer's failure to take delivery of a purchased vehicle within one week of its delivery date would cause the vehicle to "be made available for sale to other customers." Id., p. 848.

Those findings are not contested by Tesla; Reply Brief of Petitioner Tesla, Inc., p. 10, docket entry #119; and the court

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[7] Tesla has a licensed service center in Milford, Connecticut, which serves as a pickup location for vehicles purchased on the Tesla website.

finds that there is substantial evidence in the record to support them.

In determining whether an administrative agency's decision is erroneous, the court is charged with reviewing the "whole record"; § 4-183 (j)(5); and this court has done so. The evidentiary record consists entirely of the testimony of the Gallery's manager from its inception in October 2016 to the time of the hearing and exhibits introduced via his testimony.[8] The following additional facts are supported by substantial evidence in the record and are relevant and material in determining whether the hearing officer's decision is supported by the record.

Tesla designs, manufactures and sells all-electric automobiles. Its headquarters and manufacturing facility are located in California. All sales are made either via its website or at licensed stores that it owns and operates in several states. No sales are made at the Gallery, nor are the employees there authorized to accept orders for vehicles. Visitors to the Gallery may view Tesla models on display there and access Tesla's website, design a vehicle they may wish to purchase and create a "My Tesla"

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[8] The association offered and later withdrew the testimony of one Robert Gross, and the court has not considered that testimony or the exhibits introduced in support of it, also later withdrawn.

account on the website. They may also examine the inventory of vehicles already manufactured. To purchase a vehicle, however, the visitor/customer must do so elsewhere, i.e., on her own computer or at a licensed Tesla dealer in another state.

The job description for an owner advisor at the Gallery called for "someone who will be responsible for building a robust pipeline of leads and converting them into Model S owners through charismatic presentation of product and superb follow through." Record, pp. 477-78. The bonuses and commissions on sales attributable to the Gallery were paid to these employees because they assisted the customer through the website. Id., p. 477. The product specialists and owner advisors had monthly sales targets that they met by facilitating orders through the Tesla website. Id., p. 479-80, 483, 485. During the first months of the Gallery's operations, its manager testified, about fifty vehicle sales occurred to customers who had visited the Gallery, and employees were rewarded for these sales in the form of bonuses and commissions. Id., p. 485.

There are written "guidelines" that spell out "dos and don'ts" for Gallery employees. Id., pp. 659-61. According to the guidelines, Gallery employees answer all questions about Tesla

vehicles and inform customers that leasing and financing are available, with details to be found on the website or by calling a telephone sales team in California or visiting a licensed dealer in another state. Gallery employees offer and conduct demonstration drives and help customers design the car they might purchase and save that design in their "My Tesla" account on the company's website. They are specifically authorized to "explain the possibility of purchase" at www.tesla.com or by calling a Tesla employee in California. Id., pp. 659-60.

The "don'ts" are straightforward: Don't take orders or reservations, discuss specific leasing or financing terms, execute any sales contracts, collect payment or facilitate trade-ins. Id., p. 660. The Gallery manager testified that there are stricter restrictions there to make sure that employees do not sell or offer to sell vehicles; e.g., employees may not discuss prices or allow visitors to place online orders there. And, as the hearing officer found, the payment of bonuses and commissions tied to Gallery visitors who later purchased Teslas was discontinued, effective January 1, 2017. Product specialists at the Gallery were then placed on salary only and owner advisors were transferred to a licensed sales facility in New York.

The Gallery manager, who had previously worked at licensed sales locations in California and New York, identified the principal differences between the activities at those locations and the Gallery as "not being able to discuss specific options and fill out leasing or financing paperwork and not being able to do test drives . . . out of the store[9] or execute an order in there." Record, pp. 470-71.

When a customer saves an automobile configuration on the Tesla website, a copy of the company's Motor Vehicle Purchase Agreement (agreement); Id., pp. 542-45; is generated and emailed to the customer with a price quotation. The order is completed by the customer filling out and signing the agreement and making an initial payment.[10] Although the agreement provided that title to the vehicle manufactured by Tesla to the buyer's specifications transferred to the buyer when it was loaded onto a common carrier in California, it also provided, as the hearing officer found,

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[9] Because of restrictions imposed on the location by the Greenwich planning and zoning commission, test drives could not be done out of the Gallery location. They had to be done from the customer's home or some other location.

[10] This is presumably what the hearing officer meant when he found that "(t)he contract of sale and purchase is . . . *consummated* in Connecticut upon the execution and acceptance of the agreement by the buyer." (Emphasis added.) Record, p. 847.

that, if the buyer did not pick up her vehicle within one week of of the date when it was delivered to a Tesla service center or another location the parties had agreed on, "your Vehicle may be made available for sale to other customers." Id., p. 544.[11] This provision raised a question as to who actually owned the vehicle upon its delivery, the buyer or Tesla, and, therefore, where the sale actually took place, California or Connecticut.[12]

From this record the hearing officer concluded, as a matter of law, that a license is required for Tesla to carry on the activities described by the Gallery manager. Generally speaking, "(a)s to questions of law, the court's ultimate duty is only to decide whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Conclusions of law reached by the administrative

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[11] This version of the agreement was in effect while the Gallery was in operation from October 2016 to just after the hearing. It was supplanted by a revised version; Record, pp. 827-30; that distinguished between delivery in a state where Tesla is licensed to sell vehicles and delivery in a state, like Connecticut, where Tesla is not licensed to sell vehicles. In the former states the language authorizing resale by Tesla upon the buyer's failure to pick up the vehicle remains; in the latter states, the same language is absent. Id., 828.

[12] Because the court concludes that no sales of vehicles occurred at the Gallery; see p. 7, above; the question whether the sale occurred in California or Connecticut is immaterial.

agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." *Spitz* v. *Board of Examiners of Psychologists*, 127 Conn. App. 108, 116 (2011).

The rule is different, however, "when a state agency's determination of a question of law has not been subject to judicial scrutiny. . . ." *Chairperson, Connecticut Medical Examining Board* v. *Freedom of Information Comm.*, 310 Conn. 276, 281-83 (2013). In that case "the agency is not entitled to special deference....[When an agency's] interpretation has not been subjected to judicial scrutiny or consistently applied by the agency over a long period of time, our review is de novo." Id. Therefore, the court will examine the hearing officer's legal conclusion de novo, based on the factual record developed at the administrative hearing.

Before doing so, however, the court will state its understanding of the parties' positions on the law as expressed in their briefs and at oral argument.

II

Tesla's legal position is simplicity itself. Starting from the premise that no sales or offers to sell take place at the

Gallery, as those terms have been defined in Connecticut case law, it concludes that "§ 14-52 is concerned not with whether the gallery is engaged in the business of Tesla, but whether it is engaged in the business of *selling* or *offering for sale*. What matters is not whether the gallery's activities are the primary part of Tesla's commercial enterprise, . . . but whether *sales* or *offers by the gallery* are a primary and regular part of *the gallery's* business. And since the gallery never makes sales or offers, it cannot be "engaged in the business" of selling or offering for sale." (Emphasis original.) Tesla's Supplemental Reply Brief, p. 2 (Docket entry #127, Sept. 26, 2018).

Tesla's principal reliance is on *State* v. *Cardwell*, 246 Conn. 721 (1998). There the Court set aside a conviction of the owner of a ticket scalping agency in Massachusetts for violation of the criminal statute, General Statutes § 53-289, that prohibited the sale, offer for sale or attempt to sell tickets to an entertainment event in Connecticut at a price greater than the price fixed for admission on the face of the ticket plus a service charge not to exceed three dollars.[13] Id., 723 n. 1.

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[13] The statute has since been repealed.

> In Connecticut, the sale of goods is governed by the Connecticut Uniform Commercial Code-Sales (code). Under the code, a 'sale' is defined as "the passing of title from the seller to the buyer for a price. . . ." General Statutes § 42a-2-106(1). The code further provides that "unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place." . . .General Statutes § 42a-2-401(2). In addition, the code provides that "if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment. . . ." General Statutes § 42a-2-401(2)(a).

Id., 730.

Because the contracts made by the defendant for the sale of tickets did not contain any explicit agreement by him to deliver them to a particular location, and the tickets purchased by Connecticut residents were mailed to them at a post office in Massachusetts, the Court found that title to the tickets passed in Massachusetts; thus, the "sale" occurred there, not in Connecticut. Id., 731-32. Furthermore, the Court determined, the defendant did not offer to sell tickets in Connecticut, adopting a rule that an offer to sell is made in the place where the person communicating the offer is located. Id., 734. Since the defendant conveyed his offers to sell tickets over the telephone from his

office in Massachusetts, that's where the offer was made, not in Connecticut. Finally, the court concluded, as a matter of statutory interpretation, that § 53-289 did not apply to conduct that occurs out of state. Id., 738.

Applying *Cardwell's* principles to its activities in Greenwich, Tesla argues that no sales occur at the Gallery there because there is no passage of title to its automobiles there. Moreover, there are no offers to sell cars made at the Gallery, Tesla maintains. "The term 'offer' has been described as a manifestation of willingness to enter into a bargain, which would justify another person understanding that his assent to that bargain is invited and will conclude it. . . . Thus, an 'offer' creates a power of acceptance in the offeree to transform the offeror's promise into a contractual obligation." *Kieffer* v. *Danaher, Tedford, Lagnese & Neal, P.C.*, Superior Court, judicial district of New Haven, Docket No. 268178, 1990 WL 265725 (Dec. 20, 1990). No such binding offers are made at the Gallery; the only such offers are made in California when a potential customer is emailed the specifications of the vehicle he has designed or wishes to purchase from the Tesla inventory, its quoted price and the agreement.

The court agrees with these arguments of Tesla but finds that they are not dispositive. Section 53-289 provided that no person shall "*sell, offer for sale or attempt to sell* tickets to an entertainment event in Connecticut" above the face value of the tickets plus a service charge of three dollars. Section 14-52 (a), on the other hand, provides that no person, firm or corporation may "*engage in the business of . . . selling . . . [or] offering for sale* . . . any motor vehicle" without a new car dealer's license. These significant differences in language preclude resolution of this case simply by reference to *Cardwell* and without application of the principles of statutory construction to the latter statute.[14]

The defendants endorse the hearing officer's conclusion that "(t)he sale of motor vehicles is a process involving a number of activities including but not limited to advertising, merchandizing, facilitating, and educating, none of which individually or less than collectively constitutes selling, as contemplated by Section 14-52 of the C.G.S." Record, p. 847. That conclusion is wrong as a matter of law, given the Supreme Court's adoption of the code's definition of "sale" as "the passing of title from the

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[14] See Part III, below.

seller to the buyer for a price. . . ." *State* v. *Cardwell*, supra, 246 Conn. at 730.

Nevertheless, since the court's review of the hearing officer's ultimate conclusion, that "Tesla's activities at the Gallery location constitute activities for which a license is required under Section 14-52 of the Connecticut General Statutes"; Record, p. 848; is de novo, the defendants' reliance on the hearing officer's flawed definition of "sale" is not fatal to their case.

The defendants offer an analysis of § 14-52 (a) that commends itself to the court as a reasoned approach to determining the meaning of that statute.

III

> When construing a statute, our fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of the case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd and unworkable results, extratextual evidence of the meaning of the staute shall not be considered. . . . The test to determine ambiguity is whether the statute,

> when read in context, is susceptible to more than one reasonable interpretation.

(Internal quotation marks and citations omitted.) *Felician Sisters of St. Francis of Connecticut, Inc.* v. *Historic District Comm. of Enfield*, 284 Conn. 838, 847 (2008).

To determine the intent of the legislature in enacting § 14-52 (a) the court must decide what it means to "engage in the business of" selling or offering for sale a motor vehicle.

"To engage in" is not a technical term or a term of art. Pursuant to General Statutes § 1-1 (a), such "words and phrases shall be construed according to the commonly approved usage of the language." A common dictionary reference defines "to engage in" as "to begin and carry on an enterprise or activity." Merriam-Webster's Collegiate Dictionary (10th Ed. 1993). Black's Law Dictionary defines the phrase similarly as "to employ or involve oneself; to take part in; to embark on." Black's Law Dictionary, (10th Ed. 2014).

Black's Law Dictionary also provides a definition of "business": "a commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain." Id. The word has been defined in both statute and case law in Connecticut. The former are unhelpful because the

contexts of the definitions are limited and *sui generis*.[15] The cases have given "(t)he word 'business' . . . widely variant meanings." *Knights of Columbus Council No. 3884* v. *Mulcahy*, 154 Conn. 583, 590 (1967).

Common to those decisions, however, is a distinction between activity that is performed for the primary purpose of generating profit, to which the word "business" is attached, and activity that is not animated by such a purpose. For example, in *Easterbrook* v. *Hebrew Ladies' Orphan Society*, 85 Conn. 289 (1912), the Supreme Court held that use of a parcel of land for an orphan asylum and home for the aged did not violate a restrictive covenant forbidding use of the land for twenty-six specified different kinds of activities "regularly conducted for livelihood or profit"; Id., 298 ; and "any other trade or business . . . ." Id., 294. "The word 'business' is one which is used with widely variant meanings. It is used broadly to signify that which busies or engages time, attention, or labor as a principal serious concern or interest. . . . It is often used in a much narrower sense to denote that which occupies the time, attention, and labor

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[15] See General Statutes § 12-407 (a)(10) regarding sales and use taxes; General Statutes § 52-180 (d) regarding admissibility of business entries and photographic copies.

of men for the purpose of livelihood or profit. . . . The word 'business' in its ordinary and common use among men, is employed to designate human efforts which have for their end living or reward." (Internal quotation marks and citations omitted.) Id., 295, 299. See also *Fisher* v. *Board of Zoning Appeals*, 143 Conn. 358 (1956).

The court also has the benefit of an opinion of the attorney general, interpreting the term "business" in § 14-52 (a). "Although an opinion of the attorney general is not binding on a court, it is entitled to careful consideration and is generally regarded as highly persuasive." *Conn. Hospital Assn., Inc.* v. *Comm. on Hospitals & Health Care*, 200 Conn. 133, 143 (1986). The attorney general opined that the question whether a person or firm is engaged in the "business of buying, selling, offering for sale or brokering" of motor vehicles "must be made on the facts of each case . . . ." Opinions, Conn. Atty. Gen. No. 84-90 (July 23, 1984). See Tesla Supplemental Brief, Exhibit 2 (docket entry # 122, Sept. 21, 2018).

The facts giving rise to the opinion were that a car dealer that also leased cars to customers would assign the leases and titles to the leased cars to a third party, who would pay the

dealer the sales price of the leased cars and collect the lease payments from the lessees. When the leases expired, the lessee could either buy the car from the assignee, in which case the assignee would pocket the proceeds, or return the car to the assignee, in which case the assignee would sell the car to a dealer, and pocket the proceeds. The question was, did the assignee need a new car dealer's license to engage in these transactions.

The answer, according to the attorney general, lay in the intent of the assignee. If he purchased the leases near the end of their term in order to sell the vehicles, "such assignee's conduct would reflect "an *intent to engage in the selling of motor vehicles* and would require the license mandated by Section 14-52." Id., 3. On the other hand, if the assignee intended to make his money off the leases directly, and sale of the leased vehicles was "merely incidental to such business purpose, the assignee might not be a 'dealer.'" Id.

It is clear to the court from the undisputed facts found by the hearing officer that Tesla's *intent* in establishing and operating the Gallery at Greenwich was to sell Tesla motor vehicles. And, the activities there served that purpose well.

Examples of Teslas were on display for inspection by potential customers. Test drives of Tesla models identical to those on display were available, from the customers' homes or locations other than the Gallery. Customers could design their desired vehicles on a computer terminal at the Gallery, save them to a "My Tesla" account on the tesla.com website, ready for access by the customer on her personal computer and were assisted by Gallery employees in doing so. The job descriptions of Gallery employees were the same as their counterparts at authorized Tesla sales locations in other states and demonstrated by their wording Tesla's intent to accomplish sales through their efforts.[16]

For the first few months the Gallery was open its employees were compensated by way of commissions and bonuses for meeting or exceeding specific quotas of Tesla sales attributable to their activities at the Gallery. During that period, the Gallery manager testified, approximately fifty such sales occurred. While Tesla discontinued payment of bonuses and commissions after the association filed its request for a declaratory ruling, Tesla's

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[16] The job description for an owner advisor at the Gallery called for "someone who will be responsible for building a robust pipeline of leads and *converting them into Model S owners* through charismatic presentation of product and superb follow through." (Emphasis added.) Record, pp. 477-78.

briefing makes it clear that it considers such payments "appropriate"; Brief of Petitioner Tesla, Inc., p. 5 n.4 (docket entry #112, Jan. 16, 2018); and could resume them at any time. The court, on the other hand, considers the tying of Gallery employees' compensation to Tesla sales some of the strongest evidence that the goal of establishing the Gallery was to "engage in the business of selling and offering for sale" Tesla vehicles, for which a license under § 14-52 (a) is required.

If Tesla was not engaged in the business of selling motor vehicles at the Gallery, it's difficult to see what it was engaged in at that location. The record evidence is that Gallery employees educated visitors to the Gallery with the goal of selling them Teslas. So, the argument that the Gallery was simply a locus for public education about the virtues of electric vehicles borders on the fanciful. Thinking of the Gallery as a "museum", as the Gallery guidelines suggest, crosses that border.

Tesla's exclusive focus on completed sales and legally binding offers to sell as the sole indicia whether it was engaging in the business of selling motor vehicles or offering them for sale at the Gallery has the effect of reading the term "business" out of the statute, in violation of the settled principle of

statutory construction that a "statute must be considered as a whole, with a view toward reconciling its separate parts in order to render a reasonable overall interpretation." *American Universal Ins. Co.* v. *DelGreco*, 205 Conn. 178, 193 (1987).

Finally, § 14-52 (a) does not exist in a vacuum. General Statutes § 14-52b (b) prohibits a "person, firm or corporation licensed as a manufacturer," like Tesla, from holding a new car dealer's license. Having adopted a business model that provides for sales only over the internet or at dealers licensed in other states, Tesla invokes Connecticut's and the code's narrow definition of a "sale" in an effort to avoid that prohibition and carry on at its Gallery all of the activities associated with the selling of motor vehicles and with the evident purpose of accomplishing such sales while evading regulatory oversight by the department, which oversight exists to protect the public from unfair practices by car dealers.

Allowing Tesla to accomplish this end would violate the presumption in statutory interpretation that the legislature has created a consistent body of law. *Ames* v. *Comm. of Motor Vehicles*, 70 Conn. App. 790, 796 (2002). "This tenet of statutory construction . . . requires this court to read statutes together when they

relate to the same subject matter. . . . Accordingly, in determining the meaning of a statute . . .we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction." (Internal quotation marks and citations omitted.) *Felician Sisters of St. Francis of Connecticut, Inc.* v. *Historic District Comm.*, supra, 284 Conn. at 850. The legislature's enactment of § 14-52b (b), prohibiting Tesla, or any other car manufacturer, from holding a dealer's license, further supports a construction of § 14-52 (a) that prevents Tesla from sidestepping the bar on vehicle sales by vehicle manufacturers.

IV

Tesla objects to a construction of § 14-52 (a) that departs from its completed sales/legally binding offers to sell rubric because such a construction violates (1) its right to engage in constitutionally protected commercial speech; *Central Hudson Gas & Electric Corp.* v. *Public Service Comm. of New York*, 447 U.S. 557, 561 (1980)(*Central Hudson*); and (2) the principle that a criminal statute[17] must be construed narrowly and precisely to

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[17] Subsection (d) of § 14-52 provides that "(a)ny person, firm or corporation engaging in the business of the . . . selling [or] offering for sale . . . of any motor vehicle . . . without

ensure that persons can know what constitutes a violation. See, e.g., *State* v. *Indrisano*, 228 Conn. 795, 802 (1994).

A

". . . [I]t is the plaintiff's burden, so far as any constitutional issue is concerned, to establish that the effect or impact of the challenged statute on . . . it adversely affects a constitutionally protected right which . . . it has . . . under the facts of . . . its particular case." *Knights of Columbus Council No. 3884* v. *Mulcahy*, supra, 154 Conn. at 586.

Tesla's constitutional argument proceeds from the premise that its activities at the Gallery amount to no more than "[p]roviding promotional and educational information about Tesla vehicles and telling consumers where they can lawfully buy them . . . ." Brief of Petitioner Tesla, Inc., p. 30 (docket entry #112, Jan. 16, 2018). As is evident from the court's earlier discussion of the activities of Tesla employees at the Gallery,[18] the court rejects that premise. Tesla travels far beyond the boundaries of constitutionally protected commercial speech when its employees arrange for test drives of the same type of vehicles

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a license shall be guilty of a class B misdemeanor."

[18] See pp. 21-23, above.

as are on display at the Gallery, assist Gallery visitors in configuring the vehicle they wish to buy on a computer terminal in the Gallery and saving it to the Tesla website as "My Tesla," available for later purchase, and/or searching the Tesla inventory of vehicles already manufactured and available for purchase, and when those employees have been charged with and rewarded for "building a robust pipeline of leads and converting them into Model S owners through charismatic presentation of product and superb follow through."[19]

Because Tesla engages in the business of selling motor vehicles and offering them for sale at the Gallery without the required license to do so, its activities there are illegal. In a similar factual situation a federal appellate court held that commercial speech that would otherwise be protected by the First Amendment, advertising the sale of vehicles on a car manufacturer's website, did not enjoy the Amendment's protection because it was "part of an integrated course of conduct which violates Texas law - retailing motor vehicles without a license." *Ford Motor Co.* v. *Texas Dept. of Transportation*, 264 F.2d 493, 507 (5th

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[19] Record, pp. 477-78, job description of "owner advisor" at Gallery.

Cir. 2001)(*Ford*). The illegality in that case was the sale of motor vehicles in Texas by Ford, a manufacturer, when a Texas statute prohibited manufacturers from selling cars in the state.

Following the logic of the *Ford* case, the department's prohibition of even those activities at the Gallery that might qualify as commercial speech; e.g., educating customers about the virtues of all-electric cars, is justified because they are "incidental to [§ 14-52b (b)'s] prohibition of [Tesla's] right to engage in the economic activity of retailing automobiles." Id., 506. "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Pittsburgh Press Co.* v. *Pittsburgh Comm. on Human Relations*, 413 U.S. 376, 389 (1973).

Finally, an examination of the cases principally relied on by Tesla, such as *Central Hudson* and *Grievance Comm. for Hartford-New Britain Judicial District* v. *Trantolo*, 192 Conn. 15 (1984), demonstrate that they involved complete bans on advertising, the commercial speech there involved. Barring Tesla from carrying on

the business of selling and offering to sell motor vehicles via the Gallery has no effect on its ability to promote the purchase of its vehicles to Connecticut consumers through all of the other channels of advertising available to it.

Because Tesla's actions at its Gallery do not qualify as commercial speech, they are not entitled to constitutional protection.

B

Tesla argues that a construction of § 14-52 (a) that includes actions other than completed sales and legally binding offers to sell results in a penal statute "forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application," thus violating due process of law. *State* v. *Indrisano*, supra, 228 Conn. at 802.

Noone wondering whether a contemplated course of action requires a license under § 14-52 (a) need "guess at" the meaning of the statute. She may petition the department for a declaratory ruling "as to . . . the applicability to specified circumstances of a provision of the general statutes . . . ." General Statutes § 4-176 (a). Or, through the auspices of the commissioner, she may

petition for an opinion of the attorney general whether her planned actions require her to be licensed under the statute, just as did the assignee of automobile leases in the situation giving rise to Opinion 84-90 cited earlier in this memorandum.[20]

The court's interpretation of § 14-52 (a), that Tesla requires a new car dealer's license to engage in the business of selling and offering for sale motor vehicles at its Gallery in Greenwich, does not infringe on its First Amendment rights or produce an unconstitutionally broad and imprecise penal statute.

V

For the reasons stated in this memorandum the department's decision that Tesla's activities at the Gallery are activities for which a new car dealer's license is required is AFFIRMED.

The department's stay of enforcement action is continued in effect, pending the filing of an appeal or expiration of the appeal period.

BY THE COURT

Joseph M. Shortall
Judge Trial Referee

[20] See pp. 20-21, above.